No. 90-1057 (2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

MARCIE MCINTIRE,

Petitioner,

v.

THE STATE OF MINNESOTA, MINNESOTA HOUSING FINANCE AGENCY, JAMES SOLEM, individually and in his official capacity as its Executive Director; HENRY WESLEY, individually and in his official capacities as its Personnel Director; and MICHAEL HALEY, individually and in his official capacities as Director of Home Mortgage Program,

Respondents.

Petition For Writ Of Certiorari To The Minnesota Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the grant of summary judgment based on qualified immunity conflict with federal appellate precedent where the court relied on sufficient uncontroverted facts from which a reasonable official could conclude that terminating petitioner's employment would not violate her first amendment rights?

2. Does an allegation that a public employee's termination infringed her first amendment free speech rights create procedural due process rights where there is no protectable property interest in continued employment under state law?

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BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Minnesota Court of Appeals' opinion in this case. That opinion is reported at 458 N.W.2d 799 and is reproduced in the Appendix to the petition at A-1.

STATEMENT OF THE CASE

On July 2, 1984, the Minnesota Housing Finance Agency ("Agency") hired petitioner Marcie McIntire ("McIntire"), an American Indian woman, as the Indian Housing Coordinator in the Agency's Home Mortgage Division. Second Amended Complaint ("2d Am. Compl."), ¶4. The duties of the Indian Housing Coordinator were to oversee the day to day administration of Agency funds to the several urban and outstate Indian housing programs and to act as the Agency's representative to the administrators of these programs and the Indian communities they served. Deposition of Michael Haley ("Haley Dep.") at 13, Appellants' Appendix (filed in Minnesota Court of Appeals) ("App.") at 265; Deposition of Marcie McIntire ("McIntire Dep.") at 21-22, App. at 101-02. McIntire was hired as a probationary employee under state law and the collective bargaining agreement between the State of Minnesota and the Minnesota Association of Professional Employees ("MAPE"). 2d Am. Compl., ¶4, App. at 2; Haley Dep. at 13-14, App. at 265-66; MAPE Agreement, Art. 16, § 7, App. at 393.

One of the ongoing issues at the Agency at the time McIntire was hired was its relationship with one of the Indian housing programs run by the St. Paul Intertribal Housing Board ("SPIHB"). In the spring of 1984, the Agency had investigated reports that SPIHB had been misusing Agency funds through, among other things, unauthorized loans and salary advances. At the June, 1984, meeting of the Agency Board, the Agency staff informed the Board of these misuses. The Board directed the Agency to implement administrative procedures to

more closely monitor the program and to recover misused funds. Deposition of James Solem (Solem Dep.) at 50-59, Respondent's Appendix (filed in Minnesota Court of Appeals) ("Resp. App.") at 90-99; Haley Dep. at 112-14, Resp. App. at 67-69. In July, when McIntire started with the Agency, the Agency was carrying out the Board's directions. In addition, a legislative audit of the SPIHB was under way. During most of her tenure with the Agency, McIntire was aware of the problems with the SPIHB and the steps the Agency was taking to correct the problems. McIntire Dep. at 75-80, Resp. App. at 38-43.

As Indian Housing Coordinator, McIntire was the liaison with the SPIHB. Position Description of Indian Housing Coordinator, App. at 56-60. She had to review the program budgets and correspond with the SPIHB executive director and staff regarding expenditures. Her supervisor, Michael Haley, had ultimate responsibility for signing off on SPIHB projects. McIntire Dep. at 97, App. at 128; Position Description of Indian Housing Coordinator at I.B., App. at 57. In August, 1984, McIntire became concerned that at some future date she might be held accountable for misuses of funds by the SPIHB. She went to a MAPE representative, Jane Ritche, who advised her to document her disagreement with further funding of the SPIHB in order to protect herself from future liability. McIntire Dep. at 94-95; App. at 125-26.

During her initial months of employment, McIntire made several public statements which her supervisors viewed as inappropriate given her status as the Agency representative to the Indian community. In late August, 1984, McIntire made an unsubstantiated statement at a tribal meeting indicating that the State Auditor had a

conflict of interest in auditing one of the urban Indian programs. McIntire Dep. at 109-11, App. at 139-41. At a public meeting on September 4, 1984, with a representative of the Urban Indian Advisory Counsel, McIntire made a statement which clearly implied that the SPIHB was a group of sophisticated embezzlers. McIntire Dep. at 121-22, App. at 143-44. On September 27, 1984, McIntire contradicted her supervisor at an Agency board meeting. Haley later clarified with McIntire the protocol for Agency staff to speak at Agency Board meetings and asked her to communicate her ideas to him prior to the Board meeting in the future. McIntire Dep. at 139-41, Resp. App. at 45-47.

During the fall of 1984 the Agency was progressively severing its ties with SPIHB. At its October 25, 1984, meeting, the Board decided to reject the SPIHB's proposal for future funding based on past practices. The Agency continued funding the SPIHB on a contract that was then in place. Haley Dep. at 89-90, App. at 311-12.

On December 4, 1984, the Legislative Auditor issued a report on the SPIHB confirming funding abuses. App. at 610-82. After consulting with the Agency's Executive Director James Solem, Haley called the Executive Director of the SPIHB on December 6, 1984, and informed her that the Agency would no longer fund their current contract. McIntire Dep. at 170-72, App. at 178-80; Haley Dep. at 102-03, Resp. App. at 65-66. McIntire read the Legislative Auditor's report on December 5 or 6, 1984. McIntire Dep. at 170, App. at 178.

McIntire drafted a memorandum, dated December 4, the same date as the Legislative Auditor's report was

issued, that set forth numerous detailed abuses and deviations from the contract by the SPIHB.[1] App. at 83-91. Although the memo was addressed to Haley, McIntire did not give it to him. Instead, on December 7, 1984, she attempted to distribute copies of her December 4 memorandum to Senate Counsel and to members of the Indian community by depositing them in the Agency mail. Haley Dep. at 67, Resp. App. at 56.

Haley noticed an envelope that had been addressed in handwriting to Senate Counsel, retrieved it so that the address could be typewritten, and, upon opening it, discovered McIntire's December 4 memorandum. Haley Dep. at 67 and 92, Resp. App. at 56 and 61. He had never seen the December 4 memorandum before, nor had McIntire discussed with him the contents of the memorandum prior to attempting to distribute it. Haley Dep. at 67, Resp. App. at 56; McIntire Dep. at 178, App. at 183.

After reading the memorandum, Haley confronted McIntire. He informed McIntire that she would have been fired immediately if she had succeeded in distributing the

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[1] The Court of Appeals noted that McIntire's reason for writing the memorandum was the advice she had received from her MAPE union representative to document her disagreement with further funding of the SPIHB in order to protect herself from future liability. *McIntire v. State*, 458 N.W.2d 714, 717 (Minn. Ct. App. 1990), Petitioner's Appendix ("Pet. App.") at A-7. McIntire now claims, at page 4 of her petition for writ of certiorari, that she was "advised by Senate Counsel to prepare a memorandum detailing the problems with the SPIHB." To respondents' knowledge, this latter statement is not supported by the record below.

memorandum. Haley considered the memorandum inaccurate, unnecessary and its distribution outside the Agency by the Agency's representative to the Indian community to be improper. Haley Dep. at 68-69, 99-103, Resp. App. at 57-58, 62-66. McIntire then retrieved the additional copies. Haley Dep. at 69, Resp. App. at 58.

Approximately one hour after this conversation with Haley, McIntire mailed the memorandum, without Haley's knowledge, to several individuals outside the Agency, including Senate Counsel, a union representative, and members of the Indian community. McIntire Dep. at 179-81, App. at 184-86.

Due to McIntire's actions, but without knowledge of her surreptitious distribution of the December 4 memorandum, the Agency extended McIntire's probationary period instead of certifying her for permanent employment. This was done pursuant to the MAPE agreement. App. at 393. In memoranda dated January 10, 1985, and January 14, 1985, Haley outlined the types of behavior plaintiff needed to correct in order to be certified for employment. App. at 47 and 51.

After McIntire's probation was extended, Haley learned that McIntire's internal memorandum had been widely distributed. Haley Dep. at 76-77, Resp. App. at 59-60. The Agency determined that McIntire had been insubordinate and the working relationship had completely collapsed. On February 15, 1985, McIntire was non-certified and discharged from her position with the Agency for "willful misconduct." Memorandum of February 15, 1985, App. at 52.

In accordance with the collective bargaining agreement, MAPE filed a grievance on behalf of McIntire. The non-certification and discharge were affirmed. Wesley Affidavit and Attachments, Resp. App. at 73-84. The Agency then hired Donna Folstad, an American Indian woman, to replace McIntire. 2d Am. Compl., ¶36, App. at 7.

McIntire commenced this action in state district court. In June, 1987, McIntire brought a motion for partial summary judgment. Defendants also brought a motion for summary judgment. All motions were denied, and the individual defendants appealed. The Minnesota Court of Appeals remanded the case to the trial court to specifically consider defendants' claims of qualified immunity. *McIntire v. State*, 419 N.W.2d 799 (Minn. Ct. App. 1988), *rev. denied*, No. C6-89-2265 (Minn. April 20, 1988) (reproduced in Petitioner's Appendix at B-1). On remand, the district court granted summary judgment on qualified immunity grounds for the individual defendants, and the Minnesota Court of Appeals affirmed. The Minnesota Supreme Court denied review of the Minnesota Court of Appeals' decision on September 28, 1990. The Petition for Writ of Certiorari to the Minnesota Court of Appeals ("Pet.") was received by Respondents on December 27, 1990.

REASONS FOR DENYING THE PETITION

McIntire relies on the language of Rule 10.1(b) of the Supreme Court Rules as the reason why the Court should

grant review of the Minnesota Court of Appeals' decision. Under that rule the Court may review a decision if a "state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." McIntire argues that the Minnesota Court of Appeals' decision in this case conflicts with existing federal appellate authority. However, the Minnesota Court of Appeals' opinion properly identified and applied existing federal appellate authority, and there is no conflict among the courts.

I. Granting Of Summary Judgment Based On Qualified Immunity Did Not Conflict With Federal Appellate Precedent Where The Court Relied On Sufficient Uncontroverted Facts From Which A Reasonable Official Could Conclude That Terminating Petitioner's Employment Would Not Violáte Her First Amendment Rights.

Petitioner's first amendment claim is that she was fired for exercising her protected right to free expression. She agrees with the court below that *Pickering v. Board of Education*, 391 U.S. 563 (1968), provides the analytical construct in which her claim must be evaluated. Furthermore, petitioner agrees that under *Pickering* the court must balance "the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pet. at 8 (quoting *Lewis v. Harrison School District #1*, 805 F.2d 310, 313 (8th Cir. 1986), quoting *Pickering*, 391 U.S. at 568.) Petitioner agrees further that

the *Pickering* balancing requires consideration several specific factors:

1. The need for harmony in the office or work place;
2. Whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate;
3. The time, manner and place of the speech;
4. The context in which the dispute arose;
5. The degree of public interest in the speech;
6. Whether the speech impeded the employee's ability to perform his or her duties.

Pet. at 8-9. These are precisely the principles applied by the Minnesota Court of Appeals.

Petitioner's contention that the decision below is in conflict with federal appellate authority is based on the narrow proposition that in weighing the factors in the *Pickering* balancing, the court should have allowed her a jury trial, rather than granting summary judgment. Specifically, petitioner argues:

> [T]he Minnesota Court of Appeals chose not to follow established federal precedent in its holding and, instead, determined that the question of whether there was office disruption or a need for loyalty and trust could be determined by the Court without submission to a jury. See *McIntire v. State*, 458 N.W.2d 714, 718 (Minn. App. 1990), n.3.

Pet. at 10. Petitioner asserts that these *Pickering* factors "must be submitted to the jury." *Id.*

The flaws in this argument are illustrated by reference to the very footnote of the court of appeals decision cited by petitioner. In footnote 3 of the opinion, the court explained, in pertinent part:

> Ordinarily, the question of whether there is office disruption or a need for loyalty and trust is a jury matter. [Citation omitted.] Here, however, *the facts peculiar to this case are sufficiently uncontroverted* so that jury findings are unnecessary *in the context of an immunity determination.*

McIntire, 458 N.W.2d at 718 n.3; Pet. App. at A-9 (emphasis added). The decision of the court below that a jury trial was unnecessary was based on (a) the facts peculiar to this case, (b) which it determined were sufficiently uncontroverted (c) in the context of an immunity determination. These three factors, all ignored by petitioner, all militate against review by this Court.

First, the decision below was limited to and conditioned upon the "facts peculiar to this case." This Court need not devote its precious time to a determination whether the state court properly evaluated this specific factual situation.

Second, the court below did not contradict federal precedent that requires a jury trial where there are genuine issues concerning the factual aspects of the *Pickering* balancing. Rather, it made a determination, specific to the facts of this case, that here there were sufficient *uncontroverted* facts upon which to base its decision, without the aid of a jury. Not one of the cases relied on by petitioner stands for the proposition that a trial is necessary on the *Pickering* factors where the material facts are not in dispute. Obviously such a principle would fly in

the face of all of this Court's summary judgment jurisprudence. *See, e.g., Celotex v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Finally, petitioner ignores that the court's determination was made in the context of a qualified immunity analysis. As the court below noted: "Balancing these interests in the context of qualified immunity moves the fulcrum on which the decision turns." *McIntire*, 458 N.W.2d at 718; Pet. at A-9. Petitioner fails to appreciate that the qualified immunity context is significant in several ways.

First, this Court has emphasized that the purpose of its shift to an objective test based on clearly established rights was to facilitate resolution of qualified immunity issues without trial. *E.g., Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). Therefore, it was certainly consistent with this Court's teachings for the court below to determine whether there were sufficient undisputed facts on which to base qualified immunity.

Second, the inquiry in a summary judgment motion based on qualified immunity is different from that based on the merits of the case. A court can grant summary judgment on the merits of a case only if it can conclude, based on the factual material properly presented, that no reasonable fact-finder could rule for the non-moving party. *E.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In contrast, a summary judgment motion based on qualified immunity requires the court to determine whether, based on the facts of the particular case, any

reasonable official could have thought that the defendant's action was lawful. *Anderson v. Creighton*, 483 U.S. 635 (1987).[2] The Court stated in *Creighton*:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Id. at 640. Thus, the Court explained:

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[2] Petitioner demonstrates her misunderstanding of the qualified immunity test by asserting that the Court should grant certiorari "to uphold the proposition that the right to speak out about breach of public trust without retaliation was clearly established in 1985." Pet. at 12. The Court in *Creighton* held that the qualified immunity issue cannot properly be framed based on such sweeping generalities. 483 U.S. at 639. The necessity for reference to the facts at hand in the qualified immunity inquiry is even greater in cases such as this involving the conflict between public employment and the first amendment. As petitioner herself noted, this Court explained in *Pickering*:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be sought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

391 U.S. at 569 (quoted in Pet. at 7). Thus, the Court refused to state a general standard clearly establishing the circumstances in which termination of a public employee would violate free speech rights.

> The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.

Id. at 641.

It follows that the proper inquiry for the Minnesota courts in the instant case was whether it was clearly established that in the circumstances of this case terminating petitioner's employment would violate her first amendment rights. Stated another way, if there were sufficient undisputed facts from which a reasonable official could conclude that firing petitioner would be permissible under the *Pickering* balancing, summary judgment based on qualified immunity would be proper.

In this context, the decision of the Minnesota Court of Appeals affirming summary judgment based on qualified immunity was plainly correct, as well as consistent with the precedent of this Court and the federal courts of appeal. The court found that there were sufficient uncontroverted facts from which a reasonable official could conclude that terminating petitioner's employment would not violate clearly established rights.

At a minimum, the following facts are absolutely beyond dispute: Petitioner attempted to distribute publicly a memorandum addressed to her supervisor without showing it to him. After her supervisor discovered the memo and specifically directed petitioner not to distribute it, she did so anyway and concealed her action from him. The alleged fiscal mismanagement by the SPIHB that was the subject of the memo had already been publicly

reported by the Legislative Auditor at the time petitioner distributed her memo. The Housing Finance Agency had rejected future funding for the SPIHB several months before petitioner's memo and had discontinued all current funding to the Board the day before petitioner distributed her memo. Not one of these facts was controverted by petitioner.

The court below was plainly correct in determining that a reasonable official could conclude in such circumstances the interests of the public employer outweighed petitioner's first amendment interest in disseminating her memo. In the context of the qualified immunity issue, the inquiry was not whether a fact-finder could possibly find for petitioner. Rather, the salient question was whether any competent public official could conclude that termination would not violate petitioner's rights. Given petitioner's undisputed direct insubordination to her superior, plainly the court below was correct in affirming qualified immunity.

Petitioner attempts to clothe her claim in the mantle of a conflict in principle between the court below and the federal courts. However, in reality she presents nothing more than a dispute about the specific facts of this case and whether the court of appeals correctly determined that there were sufficient uncontroverted facts on which to base qualified immunity. There is no conflict among the courts, and the fact-specific resolution of the qualified immunity issue does not warrant review by this Court.

II. An Allegation That A Public Employee's Termination Infringed Her First Amendment Free Speech Rights Does Not Create Procedural Due Process Rights Where There Is No Protectible Property Interest In Continued Employment Under State Law.

McIntire asserts that this Court should grant review in order to safeguard due process rights of probationary public employees to employment and opportunity for continued employment without discharge because of their speech. Despite the fact that the state court of last resort found that McIntire failed to demonstrate a protectable property interest, *McIntire*, 458 N.W.2d at 719, Pet. App. at A-10, McIntire asks this Court to find that she was entitled to procedural due process. The source of that right, according to McIntire, is the fact that she alleged that her termination infringed her first amendment free speech rights.

Petitioner relies on *Perry v. Sindermann*, 408 U.S. 593 (1972), to argue that procedural due process was required in this case because she alleged that her first amendment rights were infringed by her termination. Petitioner cites *Perry* for the proposition that "lack of a contractural [sic] or tenure right to employment does not defeat a claim that the non-renewal of such employment violates one's rights under the First and Fourteenth Amendment." Pet. at 15. Petitioner's reliance on this aspect of the *Perry* opinion in support of her due process argument is misplaced. The Court did, indeed, hold in *Perry* that lack of a contractual or tenure right to employment would not defeat Perry's claim that he was terminated in violation of his first amendment rights. *Perry*, 408 U.S. at 596-98.

However, that was in the discussion of Perry's first amendment claim, not his due process claim. The Court explained that: "The respondent's lack of formal contractual or tenure security in continued employment . . . , though irrelevant to his free speech claim, is highly relevant to his procedural due process claim." *Id.* at 599. The Court reiterated what it held the same day in *Board of Regents v. Roth*, 408 U.S. 564 (1972), that property interests protected by due process are not created by the constitution, but by state law. *Perry*, 408 U.S. at 602 n.7. Here, the state law question of petitioner's property right to continued employment has been conclusively decided against her by the state courts. That issue "does not raise a federal question appropriate for review by this Court." *Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6 (1980).

Petitoner's argument that her assertion that she was fired in violation of her free speech rights entitled her to procedural due process was rejected in *Roth* and *Perry*. The Court in *Perry* stated:

> The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. [Citation omitted.] We have rejected this approach in Board of Regents v. Roth, 408 U.S. at 575 n.14.

408 U.S. at 599 n.5 (emphasis in original). Thus *Perry* does not stand for the proposition that an allegation of infringement of free speech rights creates a due process entitlement where state law does not establish a protectable property interest in continued employment. It stands for precisely the opposite.

Petitioner has identified no contrary authority nor advanced any reasons why the Court should reconsider this settled issue. Accordingly, there is no basis for review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: January, 1991

Respectfully submitted,

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